



Premises liability: Build on your theme right through closing argument

LET DEFENDANT'S VIOLATION OF COMMUNITY SAFETY RULES BE YOUR THEME

In premises-liability cases, common yet effective themes can be forged from the concept of community safety and the rules that ensure it. These safety rules were not only designed to protect your client, but the entire community to which the jury (and their loved ones) also belong. The violation of these safety rules endangers the entire community, just as the defendant's violation of the safety rules endangered your client, causing real harms and losses that anyone could suffer when the safety rules are not followed – or more importantly – when they are not enforced by juries.

An effective closing argument in a premises-liability case embraces this theme, and does so in a clear and concise manner, without the use of complex or over-technical terms or theories, discussing only the *key* evidence and its relation to this theme, as opposed to rehashing *everything* the jury has already heard.

If executed properly, closing argument should leave the jury feeling empowered to enforce the safety rules for the benefit of the community, with an understanding that the only way to do so is by making the violating defendant pay *full* damages for the wrong it has done.

Safety rules as a theme

In premises-liability cases, the safety rules theme is a natural fit. The rules may come from a variety of sources, including building codes, industry standards that apply to property owners/managers, your liability expert's opinions, concessions obtained from the defendant and its experts, as well as the jury instructions (see CACI 1000, et seq.).

As championed by Rick Friedman and Patrick Malone in their wonderful book *Rules of the Road*, the safety rules applicable to your case should be identified well before you file your complaint,

be developed throughout discovery, and remain a focus throughout the entire trial. The closing argument serves as the culmination of that work.

Most safety rules applying to premises-liability cases are variations of the general rule that an owner or manager of a property must always maintain its property in a reasonably safe condition. A few examples:

- Slip and fall: Stores which are open to the public are required to make periodic inspections of their floors to make sure there have been no spills that could cause a person to slip.
- Unsafe deck: Property owners which have buildings with decks more than 70 inches from the ground, are required to make sure the guardrails on the deck are at least 42 inches tall.
- Insufficient lighting in a stairway: Building owners are required to make sure that the stairways in their buildings are well lit so that people can see the stairs that they are walking on.

Cover key points only – don't rehash

Using the safety rules theme as a guide, the key evidence should be summarized for the jury in a linear fashion highlighting the evidence supporting the existence of the safety rule (e.g., experts' testimony about building codes and industry standards, defendant's concessions acknowledging the importance of safety); evidence relating to the types of premises to which the safety rules apply (and which the jurors themselves probably visit regularly), the types of people the rules were meant to protect, and the frequency and gravity of the harm the rules were designed to prevent; and finally evidence relating to the defendant's conduct which constituted a violation of the safety rules. Again, only *key* evidence should be summarized, so as not to marshal *all* of the evidence, or to rehash everything the jury has already heard.

After establishing the rules violation, it is effective to preemptively undermine the defendant's liability defenses, so as to take the wind out of the sails of the impending defense arguments. Arguing what the defense is sure to suggest, and rebutting it in your initial closing argument, is also a natural segue into your second reason for suing...because the defendant refuses to take responsibility. Exposing any "frivolous defenses" serves to emphasize the length to which the defendant and its counsel will go to avoid responsibility, a concept that can be offensive to jurors if presented persuasively.

Walk through the verdict form and jury instructions

After highlighting the key evidence supporting the safety rules and the defendant's violation thereof, it is essential to walk the jury through the verdict form and jury instructions so that the jurors understand how to apply the law to the evidence with a result of a verdict favorable to your client. Many a jury has faltered based on a misunderstanding of, or failure to pay attention to, the jury instructions because they were not properly explained by counsel during closing argument. Where you have toiled over selecting, modifying and arguing over, the jury instructions, the jury hearing a monotonous reading of pages and pages of legal terminology seemingly serving as nothing more than a tedious and boring delay before they are allowed to begin their deliberations (and the end of their jury service), is not nearly as invested in the import of those instructions as you are (or at all). So it is absolutely crucial, that you walk the jurors through the verdict form, and the jury instructions that are applicable to each question they will answer.

Blow ups and/or PowerPoint slides should be used to highlight each question

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on the verdict form, which needs to be explained to the jury. Each essential jury instruction should also be blown up, with the key language highlighted or “called out.” This should be followed by a reminder of the key evidence which in light of those instructions leads to the desired answer on the verdict form. This format should be followed for each and every question on the special verdict form.

It is good practice before reviewing the first question on the verdict form, to walk through the jury instruction on the burden of proof (CACI 200 – Obligation to Prove – More Likely True than Not True) so that the jurors are reminded that the evidence only has to weigh ever so slightly in your favor, for them to side with you on any given question.

Where applicable within your journey through the verdict form, the jury instructions relating to Premises Liability (CACI 1000 et seq.) should be explained, as should be the instructions on Causation (CACI 430), Damages (CACI 3900 et seq.), as well as those relating to Comparative Fault (CACI 401 and 405), and Apportionment (CACI 406).

Closing argument

The closing argument is your chance to bring home the importance of the safety rules applicable to your case, how the defendant violated them, how the violation resulted in harm to your client, and how a verdict representing *full* damages is the only way to enforce the safety rules for the benefit of the entire community.

A closing argument can only be effective if it is heard by the jury. The jury, who by the time closing arguments are given, has had all but enough of your trial. The jurors see the light at the end of the tunnel and are anxious to get to deliberations and decide the case. So it is your duty to keep them engaged and focused in your final moments of persuasion. Final moments that should be used to arm your favorable jurors with the

arguments they will need to fight for your client in the jury room during deliberations.

It is best to set the stage by letting the jury know what it is you are about to do and why. An effective starter is to remind the jury briefly of what you told them in opening statement were the reasons you are suing the defendant.

David Ball, in his book *Ball on Damages 3* (an essential read for any plaintiff’s lawyer), strongly recommends that in opening statement, after presenting to the jury the “story” of what the defendant did, you should tell the jury who you are suing and why. Two of the “whys” in virtually every premises liability case are:

- 1) The defendant violated a safety rule (or rules).
- 2) The defendant refuses to take responsibility for its violation of the rules.

For example, opening statement may include reasons for suing as follows: “The first reason we are suing the *property owner* is because it violated the safety rule that says a property owner must always keep its stairways well lit” (after which the evidence would be summarized as to origins of the rule, what its purpose is, what harm it prevents, and how the defendant violated it). “The second reason we are suing the *property owner* is because it refuses to take responsibility for what happened to *our client* when it violated the safety rule.”

When the opening statement follows this format, it is natural to remind the jury in the beginning of closing argument that as you told them at the beginning of the case, you are suing the property owner for two reasons. The first reason is because it violated the safety rule; the second is because it refuses to take responsibility. Now, you’re off and running.

Empower the jury

Although this article focuses little on damages, enough weight cannot be given

to the importance of spending adequate time arguing damages in closing argument. What good is a plaintiff’s verdict if it does not serve to fairly compensate your client, nor hold the defendant sufficiently accountable?

It must be explained to the jury that the violation of safety rules, such as that by the defendant in your case, is a threat to the safety of the entire community; and that the jury has been charged by our justice system to be the community’s enforcer of the safety rules, a function that can *only* be carried out if violators of safety rules are held fully accountable; and that the only way to hold a safety rule violator accountable, and to keep the community safe, is to include fair and *full* damages in their verdict.

By injecting the theme of community safety throughout your trial, and closing argument, and explaining the role of the jury as an enforcer of the safety rules that protect the community of which they are a part, you empower your jurors and confer upon them the great importance of their task in rendering a significant plaintiff’s verdict.

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